COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

IAN A. BOWLES
Secretary

LAURIE BURT
Commissioner

November 28, 2007

In the Matter of
Old Salt Outfitters
(Pirate Cove Marina)

Docket No. 2007-118
Docket No. 2007-120
Waterway Application No. W03-0926
Hingham

RECOMMENDED FINAL DECISION

This matter involves the appeal of a Chapter 91 License authorizing the applicant to maintain both year-round and seasonal floats for docking boats in Hingham Harbor. The petitioners are Thomas Patch, an individual who has applied for a mooring license in the same area in which the proposed floats are located, and the Town of Hingham, which owns a wharf in the vicinity of the proposed floats. Subsequent to a pre-screening conference that I conducted in this matter, the applicant filed a Motion to Dismiss alleging that both petitioners lacked standing to appeal because of their failure to timely file written comments on the draft license determination. The applicant also contends that petitioner Patch is not an aggrieved party entitled to maintain an appeal, and that both parties failed to state a claim upon which relief can be granted because the basis of their claims relate to local zoning matters outside of C. 91

jurisdiction. The petitioners filed Oppositions to the applicant's motion to dismiss, and the Department filed a response to the motion.

For the reasons set forth below, I recommend granting the motion to dismiss as to the Town's and petitioner's Patch's claim due of their respective lack of standing.

Standing-Failure to Timely Comment on Draft License

The regulation at 310 CMR 9.13(4)(a)(b) provides that written comments on a C. 91 license determination may be submitted either within 20 days of the close of the public comment period if a public hearing is held or within 30 days of the notification date if no hearing is held. 310 CMR 9.17(1)(b) and (d) provides that only persons or a municipal official that have submitted written comments before the close of the public comment period established by the Department may appeal a C. 91 license determination.

Petitioner Patch

The relevant chronology of notification and comment by the Petitioner Patch is as follows:

- December 11, 2003-Department issues a public notice on the Old Salt Outfitters' application establishing a notification date of December 29, 2003 and a 30-day comment period from said date.
- January 27, 2004-Petitioner files a timely detailed public comment letter in opposition to the application.
- April 21, 2004-Department issues a second public notice, apparently as a result of a modification to the application, establishing a notification date of May 6, 2004 and a 30-day comment period from said date.

- June 7, 2004-Petitioner files an opposition comment letter that states, in part, " To the extent additional commentary is necessary…please consider the comments contained in my prior response…to constitute same." The comment letter was one day late.

The applicant's motion to dismiss contended that petitioner Patch's submission on June 7, 2004 did not occur within the time period established by the notice, and therefore he waived his right to an adjudicatory hearing. See, Matter of Community Boating Center, Docket No.2004-122 (June 2, 2005). The applicant subsequently asserted in its response to the petitioner's Opposition that the petitioner's June 27, 2004 submission in response to the original application should not be considered a relevant comment because it was not directed to the license at issue here, but to a prior license determination. The notices prepared by the Department do not support the applicant's contention. The application numbers on both notifications are the same and the only difference between the description of the projects is that the 2003 notice refers to "11 timber-mooring piles" while the 2004 notice refers to "11 timber-mooring piles and walkway and finger floats", both at the same location. It is apparent from the petitioner's comment that he believed the projects were the same and his prior comments were relevant. While the regulations clearly require timely written comment as precondition to have standing to appeal, the applicant's desire to clarify or modify its project and the Department's decision to issue a second notification with the same application number and virtually identical project descriptions at the same location should not create a potential "procedural trap operating as an absolute appeal bar"[1] for persons who commented on the first notice but who may not be aware of the necessity to submit timely duplicate comments on what appears to be the same

[1] See, Matter of Gloucester Redevelopment Authority, No. 86-088, Decision and Order on Motion to Dismiss, at 11; 9 MELR 1463 (Aug. 7, 1991).

application. I conclude that the petitioner's comments in response to the December 11, 2003 notice was sufficient to meet the timely public comment requirement of 310 CMR 9.17.

Town of Hingham

The Town did not respond to the December 2003 notice, and the response to the April 2004 public comment notification was a memorandum, dated May 17, 2004, from the Town Planner to the Department that requested on behalf of the Planning Board a 30 day extension of the public comment period to allow it to hold a public hearing and represented that comments would be submitted "within a day or two after the hearing." However, the Town did not submit anything further to the Department until an August 12, 2006 letter from the Town Planner was filed criticizing the project. The Town's Opposition to the applicant's motion to dismiss contended that the Department did not respond to the extension request, and argued that since the Department did not respond to their 2004 request for an extension, the comment period was *de facto* left open until it commented two years later. That contention is untenable[2].

The regulations set out distinct pathways for public comment from a municipal official and from the planning board. The regulations at 310 CMR 9.13(4) set out the timetable for public comments, while 310 CMR 9.13(5)(a)(b) describes the options for a planning board to either conduct a public hearing within 30 days of receipt of the application and then submit a written recommendation to the Department within 15 days thereafter, or dispense with a hearing and file the recommendation within 45 days from the application receipt date. Subsection (c) further provides that if the planning board fails to conduct a public hearing or submit a

[2] Compare Matter of Lenten, Docket No. 2004-125, Recommended Decision (October 29, 2004) (The failure of the Conservation Commission's response to petitioner's Request for Determination of Applicability to expressly state that it was denied or superseded by the applicant's Notice of Intent did not extend the appeal period on the Order of Conditions from ten to seventy days.)

recommendation as provided in subsection (b), the Department may proceed to make a determination to issue a license without the benefit of a recommendation.

The May 2004 memorandum made clear the Hingham Planning Board's intent to hold a public hearing to provide an opportunity for public comment and the schedule it intended to follow. It offered no information or recommendation regarding the proposed project. It is apparent from the memorandum's content that the Board was communicating its intent to exercise its authority under 310 CMR 9.13(5)(b) to hold a hearing and submit a recommendation, and not a communication of the Town's public comment on the draft determination pursuant to 310 CMR 9.13(4). The fact that the Town did not contend in its Opposition that a hearing was ever held or any comment submitted within time period prescribed by 310 CMR 9.13(5)(c) authorized the Department to proceed without the Board's input. See, Matter of GTE Operations Support, Docket No. 49-052, Final Decision-Order of Dismissal (April 7, 1995); holding that the regulatory terms "public comment" and "public review" cannot be used interchangeably to as a means to extend the public comment period.

The Town also alleged that it was mislead into believing the project just involved the removal of bottom anchors and installation of timber moorings, and was unaware that the proposed license was for a term of thirty years. The notice complied with explicit content requirements prescribed by the regulations (310 CMR 9.13(1)(c)). Moreover, the notification explicitly described the project to include "walkway and finger floats", in addition to the mooring timbers. The term of the license is consistent with the 30-year default term provided for in the regulations (310 CMR 9.15). The fact that the Planning Board requested an extension of the comment period to hold a public hearing suggests that it was aware the license was not simply an alteration from anchors to pilings.

Finally, the Town argues that Department is statutorily prohibited under M.G.L. c. 19, § 18 from conditioning the right to appeal the license determination on the timely submission of written comments. This contention has been previously raised and rejected on the grounds that … "to the extent the Planning Board is challenging the facial validity of the regulations, it is in the wrong forum." Matter of GTE Operations Support, *supra* at 3; Matter of N&C Realty Trust, Docket No. 94- 025, Final Decision - Order of Dismissal (November 23, 1994).

For the reasons set forth above, I conclude that the Town did not comply with the provisions of either 310 CMR 9.13(4) or (5) and waived its right to appeal. The Town has asserted an interest in being granted intervener status, but in light of my recommendation to dismiss petitioner Patch's claim, the request is moot and must be denied. Matter of Connolly Brothers Inc., Docket No. 2002-033 (Recommended Final Decision-Order of Dismissal (May 24, 2002).

Standing-Aggrieved Party Status

The Waterways Regulations define an aggrieved person as "any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A." 310 CMR 9.02. The case law has established a three-prong test to determine if a person is aggrieved. First, one must allege a harm that is grounded in one of the public interests protected by c. 91. Second, the harm alleged must be a concrete injury to oneself that would flow from the subject matter of the proceeding. Third, one must show that the alleged injury is unique or different from an injury that would be suffered by a member of the general public. Matter of Waterside Group LLC-2, Docket No. 2001-130, Recommended Final Decision, 2 DEPR 291, 292-93 (Dec. 3, 2002). In

applying the "unique injury" criterion to the public trust interests at issue in a C. 91 appeal, the cases establish that a party appealing a waterways license must have more than "vague and transient interest in the matter", and that the aggrievement "be high enough to assure that the appealing party will be a responsible representative of the public trust beneficiaries and a diligent advocate of significant public rights and interests it asserts." Matter of Gloucester Redevelopment Authority, Docket No. 86-088, Decision and Order on Motion to Dismiss, at 15-16; 9 MELR 1463 (Aug. 7, 1991); (fishers' association's interest in adequate vessel dockage and preventing displacement of the size and class of boats used by association members); Matter of Pamet Harbor Yacht Club, Inc., Docket No. 98-093, Decision and Order on Motion to Dismiss, 6 DEPR 11 (Jan. 29, 1999); (abutting landowner's claim that proposed pier would interfere with its own navigation rights).

A petitioner must present facts sufficient to support a determination that he is in fact aggrieved by the project. "That burden is not a particularly difficult one to meet,"…[but] "as low a threshold as this is, however, it cannot be crossed with anything other than factual support." Matter of Town of Chatham, Docket No. 98-078 Final Decision (December 22, 1999). Petitioner Patch asserts two grounds to support his aggrieved status.[3] First, he states and documents that he is one of approximately one hundred people on a waiting list maintained by the Town of Hingham for a mooring spot in the same mooring basin that is the site of applicant's project. Second, he represents and documents that he submitted a "rolling"[4] c. 91, §10A application to

[3] For the purpose of the applicant's motion to dismiss that the factual allegations in petitioner Patch's claim are presumed to be true. See, In the Matter of Edward Lawson, Docket No. 2000-111, Recommended Final Decision (February 2, 2001), Adopted by Final Decision (February 7, 2001).

[4] It is unclear whether a rolling application is valid since Article 15 of the Harbor By-Law requires annual reapplication.

the Town's Harbormaster[5] seeking a float permit at or near the same location the Department's license granted to the applicant's project. He argues that if the applicant's license remains in effect those on the waiting list, including himself, will be precluded from using the portion of the mooring basin occupied by the slips.

The first criterion of the three-pronged test appears to be met by the petitioner since mooring is an aspect of the public's right to navigation protected by the regulations (310 CMR 9.35(2)(a)).[6] There is, however, a fundamental flaw in the facts alleged on behalf of his aggrieved status that undermines the basis of his claim. The application to be placed on the Harbormaster's waiting list was filed on October 10, 2007, three months after the license was issued, the float permit application was filed 20 days after license was issued, and in both instances after the Notice of Claim (NOC) was filed as well. The dates of the application make clear that he did not suffer the harm alleged to arise at the time he filed his public comments, at the time the Department issued the license decision, or even by the time he filed his appeal. He did not sustain injury as a result of the license proceeding, but attempted to prospectively put himself in harm's way by applying for moorings in the basin in general and at the same location as the applicant's license. Attempting to acquire after the fact aggrieved party status to challenge a C. 91 license is not a legitimate grounds upon which standing should be granted as it subverts the administrative decision making and adjudicatory review processes.

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[5] 310 CMR 9.07 establishes a procedure under which the Harbormaster may grant annual permits for moorings and floats subject to Department review by an aggrieved applicant. The Department's decision is not subject to adjudicatory appeal.

[6] Claims related to the docking and mooring of boats is considered a component of the public's right to navigation 310 CMR. 9.35(2)(a). In the Matter of the Town of Truro, Docket No. 2006-027, Recommended Decision (May 25, 2006); Matter of Pamet Harbor Yacht Club, Inc., No. 98-093, Decision and Order on Motion to Dismiss, 6 DEPR 11 (Jan. 29, 1999).

Moreover, the application is hypothetical or speculative, at best,[7] since he owns no land from which the proposed facility could be accessed. Based on the plans the petitioner submitted as part of his untimely application, he would be dependent upon obtaining rights from Town owned land to secure and access his proposed facility. Similarly, the petitioner does not claim to own a boat, and he is number 110 on a waiting list where the first person in line has been waiting for a mooring since 2005. While a petitioner does not have to prove that the alleged harm will in fact occur, injuries that are abstract, theoretical, remote or speculative cannot confer standing. Matter of Arlex Oil Corporation, Docket No. 2005-242, Decision and Order on Motion to Dismiss (March 3, 2006); Matter of Town of Ipswich, Docket No. 2002-109, Decision and Order on Motion to Dismiss (November 2, 2005). As was said of a petitioner who had a commercial lobster permit but only put some pots in the water after a related wetlands appeal was denied for lack of standing: "[W]hat [the petitioner] appears to be doing is fishing for standing, not lobster." Matter of Meadows at Marina Bay, LLC and the Marina Bay Co. Inc. Docket No. 38-004 (September 28,1998).

The underlying basis of the petitioner's claim appears to be that the license allowed the applicant to "jump the line" ahead of himself and others on the waiting list.[8] By its nature, granting the right to one person to conduct a licensed activity may preclude another member of the public from conducting the same activity at the same location, as it has done annually since 2003 when the applicant first obtained Harbormaster approval to establish the floats and slips that are now the subject of this appeal. The effect of the license on the petitioner in reducing the

[7] The applicant represents that the Harbormaster had already denied the application, but that is not documented in the record.

[8] The petitioner also asserts claims that the license will adversely affect the Town's ability to use its property, but those alleged harms cannot be advanced by the petitioner to establish his personal standing.

potential universe of mooring locations[9] that may be awarded annually by the Harbormaster, in the absence of other factors, is not an injury sufficiently different or unique than one suffered by the general public to establish standing to appeal. The petitioner has expressed interest, along with more than one hundred other residents, in obtaining a generic mooring spot, since there is nothing that indicates that the list is limited to moorings at the same location as the one granted under the license. Establishing aggrievement on the basis of the list alone would grant standing to any person currently or in the future on the list to challenge a license decision on the grounds that it might reduce the universe of mooring locations that could be assigned by the Harbormaster, regardless of whether the person owned a boat, the person's position on the list or, as in this case, the license simply made moorings permanent rather subject to annual distribution. I conclude that simply having ones' name on such a list does not, in itself, establish a sufficiently unique interest different from the general public to be a "responsible representative of the public trust beneficiaries and a diligent advocate of significant public rights and interests." Matter of Gloucester Redevelopment Authority, *supra.* Matter of Intel Harbor LLC, Docket No. 2003-047 (August 27, 2003).

For the reasons set forth above, I recommend that the claims of the Town of Hingham and petitioner Patch be dismissed for lack of standing.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be

[9] The license requires that all vacant berths at the facility be assigned on in a fair and equitable manner to the public patrons of said facility. Thus the license ensures a means by which the petitioner or others on the list may be able to dock a boat at the licensed location.

appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this mater has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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Philip Weinberg
Presiding Officer